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No. 90-285

In the Supreme Court of the United States

OCTOBER TERM, 1990

LITTON FINANCIAL PRINTING DIVISION,
A DIVISION OF LITTON BUSINESS SYSTEMS, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS RESPONDENT SUPPORTING PETITIONER

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This case involves the validity and application of the National Labor Relations Board's rule regarding the duty of employers and representatives of employees to arbitrate grievances under expired collective bargaining agreements. That rule, set forth in *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. 53 (1987), provides that an employer is required to arbitrate only those post-expiration grievances "arising under" the expired contract, *i.e.*, disputes concerning "contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." *id.* at 60.

Here, the Board concluded that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by unilaterally repudiating the arbitration provisions of the expired contract with respondent union. Under the *Indiana & Michigan* rule, however, the Board determined that the union's post-expiration grievances about petitioner's layoff of employees were not arbitrable under the contract.

In a broadside attack on the Board's *Indiana & Michigan* rule, the union contends that petitioner has a contractual obligation to arbitrate the layoff grievances. Moreover, the union argues that the National Labor Relations Act itself obligates petitioner to arbitrate those grievances. Petitioner, on the other hand, agrees with the Board that the grievances were not arbitrable under the *Indiana & Michigan* rule. Petitioner asserts, however, that its refusal to arbitrate post-expiration grievances did not even amount to an unfair labor practice. As we shall show below, the union's arguments and those of petitioner fail to undermine either the validity of the *Indiana & Michigan* rule or the propriety of the Board's application of that rule to the facts of this case. Accordingly, the court of appeals erred in refusing to uphold the Board's order declining to direct arbitration of the union's grievances.

1. The union contends (Br. 19-28) that the Board's *Indiana & Michigan* rule conflates the arbitrability of a grievance with the merits of the particular dispute and thus may not be squared with this Court's decisions in cases such as *Nolde Bros.* v. *Local No. 358, Bakery Workers*, 430 U.S. 243 (1977). The union's position is mistaken on two grounds. First, the union misconceives the Board's role in ordering

arbitration of post-expiration grievances. Second, the union misreads this Court's pertinent arbitration decisions.

a. The Board considers the issue of arbitrability against a background that differs markedly from the circumstances presented to courts adjudicating suits under Section 301 of the Labor-Management Relations Act, 1947 (LMRA), 29 U.S.C. 185. Such Section 301 actions involve claims for specific performance of promises to arbitrate grievances. See, *e.g.*, *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 451 (1957). If the court determines that the reluctant party promised to arbitrate the grievance at issue, the court must order specific performance. See, *e.g.*, *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). Indeed, the court may not refuse to order arbitration on the ground that the contractual claim is meritless or unfair. See, *e.g.*, *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568 (1960).

The Board's authority over arbitration clauses in collective bargaining agreements is circumscribed not by the practice under the LMRA, but rather by the fact that the Board exercises such authority only in the course of adjudicating and remedying unfair labor practices. *NLRB* v. *Strong*, 393 U.S. 357, 360-361 (1969). Under the Board's settled practice, a refusal to arbitrate a particular grievance or class of grievances does not automatically violate the National Labor Relations Act, even if the grievance or grievances in question are in fact arbitrable. See NLRB Br. 4-5 n.4. Accordingly, in this case, as in *Indiana & Michigan Elec. Co.*, the question of arbitrability does not relate to the underlying issue of whether an unfair labor practice has occurred. Rather, the arbitrability of the grievances is relevant only to the

Board's selection of an appropriate remedy for the proven unfair labor practice of total repudiation of the arbitration procedure.

Moreover, the Board need not automatically order arbitration as a remedy for the unfair labor practice of repudiating the arbitration procedure. As this Court has made plain, "nothing in the language or structure of the Act * * * requires the Board to reflexively order that which a complaining party may regard as 'complete relief' for every unfair labor practice." *Shepard* v. *NLRB*, 459 U.S. 344, 352 (1983). For example, in *Paramount Potato Chip Co.*, 252 N.L.R.B. 794, 797-798 (1980), the Board entered a cease and desist order to remedy the employer's unlawful general repudiation of the contractual arbitration procedure during the term of the contract; the Board chose not to order arbitration of any specific grievances. For these reasons, the union is mistaken in suggesting that the Board must order arbitration in the face of the sort of unfair labor practice at issue here.

b. This Court's arbitration decisions, like the Board's *Indiana & Michigan* rule, ensure that courts —rather than arbitrators—determine the threshold question whether the parties agreed to arbitrate particular disputes. Contrary to the union's view (see Br. 20-21), the Court's decisions do not support a rule making presumptively arbitrable any dispute over the interpretation or application of a provision of an expired collective bargaining agreement.

In *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643 (1986), for example, a dispute arose over whether a layoff of certain employees violated the provision of the collective bargaining agreement (Article 20) prescribing the order in

which employees would be laid off because of lack of work. The union claimed that the layoff violated Article 20 because there was no lack of work; the union thus sought to compel arbitration under Article 8, which provided for arbitration of differences arising over interpretation of the agreement. The company countered that the grievances were not arbitrable under the Article 9 exemption for "certain management functions." 475 U.S. at 645. The court of appeals upheld the district court's decision ordering arbitration. The court reasoned that, since a determination of arbitrability would require it to interpret two substantive provisions of the contract, deciding the arbitrability issue would also impermissibly require the court to consider the merits of the dispute. *Id.* at 647-648.

This Court reversed. The Court reaffirmed the principle "that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." 475 U.S. at 649. Nonetheless, the Court emphasized that "[u]nless the parties clearly and unmistakably provided otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Ibid.*; see *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. at 582-583; *International Union of Operating Engineers, Local 150* v. *Flair Builders, Inc.*, 406 U.S. 487, 491 (1972). Indeed, the Court recognized that this rule "follows inexorably" from the rule that a party cannot be required to arbitrate absent a prior agreement to do so. *AT&T Technologies*, 475 U.S. at 649. "With these principles in mind," the Court concluded, "it is evident that the [court of appeals] erred in ordering the parties to

arbitrate the arbitrability question." *Id.* at 651. The Court determined that the court of appeals had failed to perform its duty "to interpret the agreement and to determine whether the parties intended to arbitrate grivances concerning layoffs predicated on a 'lack of work' determination by the [employer]." *Ibid.*[1]

In *AT&T Technologies*, the Court thus recognized two principal points which support the Board's *Indiana & Michigan* rule. First, there is not always a bright line between the issue of arbitrability and the merits of the underlying dispute. Second, the possibility of some overlap between the two—which exists where arbitrability cannot be determined without interpreting substantive contract provisions—does not relieve the reviewing authority of its obligation to decide the issue of arbitrability.

This Court's decision in *Nolde Bros.* v. *Local No. 358, Bakery Workers*, 430 U.S. 243 (1977), is fully consistent with *AT&T Technologies*. In *Nolde*, the Court recognized that it had a threshold obligation to determine whether the parties had agreed to arbitrate grievances arising after expiration of the contract. 430 U.S. at 250-251. The Court was able to make that determination, however, without interpreting any substantive provision of the contract. The employer had staked out the position that, since the duty to arbitrate is contractual, the duty necessarily

[1] The union asserts that, in *AT&T Technologies*, the court of appeals erred in failing to "determine arbitrability under the arbitration clause *at all*." Br. 22 n.13 (emphasis in original). As this Court explained, however, the lower court erred in failing to interpret the substantive provisions of the contract that were relevant to a determination of whether the parties intended to exclude the subject matter of the grievance from the coverage of the arbitration clause. *AT&T Technologies*, 475 U.S. at 651.

terminated with the expiration of the contract. The Court rejected that contention, noting that the arbitration clause did not expressly exclude post-expiration disputes, that there were strong reasons to conclude that the parties did not intend their arbitration duties to terminate automatically with the contract, and that the severance pay dispute at issue would have been subject to resolution under the arbitration procedure had it arisen during the contract's term. See *id.* at 249-250, 252-253.

In other words, given the context of the case—the employer's broad contention and the union's severance pay claim involving "accrued" or "vested" rights earned by employees during the term of the contract but payable only upon termination of employment, 430 U.S. at 248—the Court in *Nolde* had no occasion to determine whether the parties intended to arbitrate other kinds of post-expiration disputes.

c. The Board's *Indiana & Michigan* rule requires arbitration of only those post-expiration grievances concerning "contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 60. That rule is a test for determining the arbitrability of the grievance, rather than its merit, and thus is fully consistent with the principles articulated in the Court's decisions discussed above. Accordingly, the Board does not examine an expired contract to determine whether a particular grievance is meritorious. The Board examines the expired contract only to determine whether there is a sufficient nexus between the subject matter of the grievance and the contract to justify a conclusion that the parties intended to arbitrate the grievance despite the expiration of the contract.

That is precisely what the Board did in this case. The Board did not determine whether the contested layoffs out of seniority violated the contract. Rather, the Board considered the relevant terms of the contract, *i.e.*, requiring that layoffs be made on the basis of seniority only if other factors such as aptitude and ability were equal, merely to determine whether the nature of the right asserted was such that it could reasonably be assumed—in the absence of any affirmative evidence as to the parties' intent—that they intended this right to remain enforceable after the contract expired.

As we have shown (NLRB Br. 27), the Board reasonably concluded that, regardless of the merits of the particular grievances, the right asserted—which would depend on a comparison of the aptitude and ability of employees after the contract expired—was not the kind of right that presumptively survives the contract's expiration. Accordingly, the Board reasonably determined that the grievances, although invoking a provision of the expired contract, did not "arise under" the contract. For that reason, the Board concluded that there was no basis for ordering arbitration.[2]

2. The union further contends (Br. 32-48) that, even if it had no *contractual* right to insist upon arbitration of the layoff grievances, it had a *legal* right to such a remedy. In so contending, the union invokes the principle established in *NLRB* v. *Katz*, 369 U.S.

[2] As we have explained (NLRB Br. 26-27), the court of appeals was mistaken in its conclusion that the Board's application of the *Indiana & Michigan* rule here was inconsistent with previous Board decisions. See *Uppco, Inc.*, 288 N.L.R.B. 937 (1988); *United Chrome Prods., Inc.*, 288 N.L.R.B. 1176 (1988).

736 (1962), namely, that an employer must maintain the status quo with respect to mandatory subjects of bargaining and refrain from unilateral changes until bargaining to impasse.[3] The Board, however, has reasonably determined to treat arbitration agreements as outside the framework of the unilateral change doctrine.

a. The union asserts (Br. 38) that, since all terms of employment other than those imposed by law are the product of consensual agreement, there is no basis for the Board's distinguishing the commitment to arbitrate on that ground.[4] The employer's obligation not to make unilateral changes in terms of employment after expiration of a collective agreement is part of "the general rule that an employer must bargain about changes in terms and conditions of employment regardless of how those terms came to be initially established." *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 55. Indeed, the union acknowledges

[3] The union raised this argument before the court of appeals, but the court had no occasion to consider it. See Pet. App. A16-A18; NLRB Br. 13 n.15. In these cirmumstances, the union may properly raise this issue before the Court. See, *e.g.*, *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984); *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979).

[4] The union ignores the fact that proposals concerning most terms of employment that are mandatory subjects of bargaining may be implemented by the employer after bargaining to impasse with the union. This is not true, however, of a no-strike clause, which involves a waiver of the union's statutory right to strike. See, *e.g.*, *Colorado-Ute Elec. Ass'n*, 295 N.L.R.B. No. 67 (June 15, 1989). Since an agreement to arbitrate is the *quid pro quo* for a no-strike commitment (see pp. 13-15, *infra*), the Board could reasonably conclude that it, too, cannot be put into effect—or continued—except by mutual consent.

that the statutory obligation to maintain existing terms of employment "is not rooted in the contract," and applies to past practices as well as contract terms. Br. 34 n.21.

Accordingly, it is generally no defense to a post-contractual unilateral change that the employer no longer *consents* to maintain a particular contractual term. The gravamen of the Section 8(a)(5) violation is not that the employer has abrogated a contractual term, but that it has changed a term of employment without first bargaining with the union. The obligation to maintain the existing terms arises by operation of the Act in order to protect the bargaining process. See *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988). The obligation does not at all stem from the employer's agreement to maintain the terms in its collective agreement.

b. However, the Board has not applied that general rule inflexibly. See NLRB Br. 4. To do so, the Board has recognized, would undermine the policies and purposes of the Act. In *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 57-58, the Board explained that requiring an employer to adhere to a contractual commitment to arbitrate after contract expiration would violate the congressional mandate that the Act not require compulsory arbitration as a method of settling questions arising under collective agreements. The Board pertinently noted that the version of Section 8(d) passed by the Senate provided that "to bargain collectively is the performance of the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or *the settlement of* any question arising thereunder." 1 NLRB, *Legislative*

History of the Labor-Management Relations Act, 1947, at 242 (1985) (emphasis added). The underscored language was deleted in conference:

> [T]he Conference agreement omits from the Senate amendment words that were contained therein which might have been construed to require compulsory settlement of grievance disputes and other disputes over the interpretation or application of the contract.

H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 35 (1947).

The Board therefore based its decision to treat an expired contractual commitment to arbitrate differently from other expired contractual terms—for purposes of determining whether that commitment survives the expiration of the contract by operation of law—on "the clear intent of Congress." *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 58. Indeed, the Board's crafting of its *Indiana & Michigan* rule is consonant with this Court's jurisprudence. In *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 374 (1974), for example, the Court stressed that "[n]o obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so." Accord *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. at 582.

c. The union acknowledges (Br. 39) that Congress did not intend the statutory obligation to bargain about terms and conditions of employment to include compulsory binding arbitration. The union argues nonetheless that Congress's concern about compulsory arbitration was limited, extending only to the initial decision to adopt that method of resolving disputes, as opposed to its continuance once

voluntarily adopted. But where an employer has agreed to arbitrate disputes only during the life of a contract, a requirement that it continue that commitment in effect beyond the intended duration abridges the employer's freedom to contract no less than does compelling it to agree to arbitration initially. The right not to agree to arbitrate includes the right to impose a time limitation on the agreement and to decline to arbitrate any disputes arising beyond that time.[5] Indeed, if an employer were compelled by operation of law to continue an agreement to arbitrate in effect until it had bargained to impasse over the terms of a new agreement,[6] the employer might be inclined to refuse to agree to arbitrate at all, or to impose stringent limitations on the types of disputes it would agree to arbitrate. Cf. *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 289 (1957) (declining, on similar grounds, to read Section 8(d) as prohibiting strikes for the entire duration of a contract with a midterm reopener clause). Such a result, in the Board's view, would undermine the federal labor policy favoring arbitration.

Against this backdrop, the Board has recognized that an agreement to arbitrate is "a voluntary surrender of the right of final decision which Congress has reserved to the [contracting] parties," and that

[5] The union recognizes that the contractual duty to arbitrate could be terminated by a contractual provision that "expressly provide[s] that grievances arising after the contract has expired are not arbitrable." Br. 17 n.8.

[6] An employer ordinarily is not entitled to change an existing term of employment unilaterally until an impasse has been reached on an overall contract proposal. See *Henry Miller Spring & Mfg. Co.*, 273 N.L.R.B. 472 (1984); *Bi-Rite Foods, Inc.*, 147 N.L.R.B. 59 (1964).

it is, "at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize." *Hilton-Davis Chem. Co.*, 185 N.L.R.B. 241, 242 (1970); accord *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 57. Absent a mutual agreement to arbitrate, the Board has determined, "the parties revert to the statutory scheme of 'free' collective bargaining, wherein each party must attempt in good faith to reach agreement, but is under no statutory mandate to reach agreement or to forfeit its right to utilize its economic power if no agreement can be achieved." *Hilton-Davis Chem. Co.*, 185 N.L.R.B. at 242; see also *NLRB* v. *Insurance Agents' Union*, 361 U.S. 477, 489 (1960) (Under the Act, the "necessity for good-faith bargaining between the parties, and the availability of economic pressure devices to each * * * party * * * exist side by side.").

Imposition of an obligation to arbitrate post-expiration contractual disputes as a matter of law would distort the statutory scheme. The arbitration agreement, which is the *quid pro quo* for the union's no-strike pledge, see *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 455 (1957), would continue in effect, thereby compelling the employer—against its will—to continue to cede its decisionmaking authority to an arbitrator and to forgo the use of economic weapons to resolve the dispute. Yet, the union would remain free to strike the employer in support of its demands, since the no-strike clause could not be enforced during this period without requiring the union to waive its statutory right to strike guaranteed by Section 13 of the Act, 29 U.S.C. 163.[7] The

[7] Section 13 of the Act, 29 U.S.C. 163, provides:

> Nothing in this [Act], except as specifically provided for herein, shall be construed so as either to interfere

employer's willingness to agree to arbitrate at all would be reduced if it were faced with the possibility of such a situation.

d. The union acknowledges (Br. 19, 44) that a no-strike commitment is contractual, that it would terminate with the expiration of the contract, and that the union would then be in a position to strike to change the existing terms and conditions of employment. The union contends, however, "that if *Katz* applied to arbitration clauses, [so that] the employer could not lock out in support of its position in a dispute about whether a certain action is inconsistent with the prior contract's norms," the Board could work out "a solution consistent with the statute, both in preserving the union's statutory right to strike and the overall balance of power between the parties." Br. 45-46. Thus, the union suggests that "where [a] union actually invokes the arbitration procedure with respect to a particular grievance," this "could then support the conclusion that there is a concomitant commitment not to strike concerning that grievance as well." Br. 46. In the alternative, the union suggests, "it is possible that [a] union could be required to express a willingness, for some period of time * * * not to strike over arbitrable grievances, before it could successfully invoke the arbitration clause in the first instance after contract expiration." Br. 46-47.

This proposal—which is premised on a union's willingness to continue its no-strike commitment—falls short of the mark. The union's solution does not resolve the situation where the employer seeks arbitration of contract hiatus grievances and the

with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

union responds that since those grievances fall outside the expired contract, the union remains free to strike over them. In those circumstances, the union's proposal would leave the union free to strike over the grievances, while the employer, because of the continuation of the arbitration procedure by operation of law, would be precluded from countering the strike with a lockout or other economic pressure. This imbalance could be corrected only by prohibiting the union from striking—a result that would collide with Section 13.[8]

In view of the pitfalls of applying the *Katz* doctrine to flesh out the duty to arbitrate post-expiration grievances, the Board's refusal to do so is not only "reasonably defensible," *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979), but precisely the sort of decision that—as this Court has repeatedly recognized—should be accorded considerable deference, see, *e.g.*, *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549 (1990); *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957).

[8] Contrary to the union's contention (Br. 46 n.30), arbitration is significantly different from earlier steps of the grievance procedure which, under the Board's *Indiana & Michigan* rule, survive the contract's expiration as a matter of law. As the Board has explained, those earlier steps—unlike arbitration—do not involve surrendering final decisionmaking authority to a third party. See *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 54.

The union's references (Br. 38, 41 n.25) to arbitration procedures unilaterally imposed by certain nonunion employers are beside the point. Those procedures—unlike the procedures resulting from collective bargaining—cannot be enforced under Section 301 of the LMRA and cannot operate as a waiver of the right to strike. See *United Food Workers Union, Local 7* v. *Gold Star Sausage Co.*, 897 F.2d 1022, 1026 (10th Cir. 1990).

3. Petitioner contends that, even if its contractual commitment to arbitrate included some post-expiration grievances, its blanket refusal to arbitrate post-expiration grievances did not amount to an unfair labor practice because "Congress did not choose to provide that a breach of a collective bargaining agreement would also be an unfair labor practice in violation of Section 8(a)(5)." Br. 14; see *id.* at 12-14. Petitioner did not raise that argument before the Board or the court of appeals.[9] Indeed, petitioner did not even raise that contention in its petition for a writ of certiorari. In these circumstances, the issue is not properly before the Court. *E.g.*, *Air Courier Conference* v. *American Postal Workers Union*, No. 89-1416 (Feb. 26, 1991), slip op. 4-5; *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 602-603 (1991); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioner's contention is without merit. The Board has long held that

> [o]rdinarily, a breach of a collective-bargaining agreement, including a refusal to arbitrate, does not constitute a *per se* violation of Section 8(a)(5) of the Act. * * * [However], where an employer's breach of contract is so clear and flagrant as to amount to either a repudiation of the contract or a unilateral modification of it, the Board will find a violation of Section 8(a)(5).

Paramount Potato Chip Co., 252 N.L.R.B. 794, 796-797 (1980); accord *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 59; *GAF Corp.*, 265 N.L.R.B. 1361, 1364-1365 (1982); *United Tel. Co.*, 112 N.L.R.B. 779, 781 (1955).

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[9] See Section 10(e) of the Act, 29 U.S.C. 160(e); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 666 (1982).

As we have explained (see NLRB Br. 3-7), before this Court's *Nolde* decision, the Board did not consider a blanket refusal to arbitrate grievances arising after the expiration of a collective bargaining agreement to be an unfair labor practice. The Board reasoned that such a refusal was not tantamount to a wholesale repudiation of the agreement to arbitrate because that agreement terminated when the contract expired. See *Hilton-Davis Chem. Co.*, 185 N.L.R.B. at 242. In light of *Nolde*, where this Court ruled that a commitment to arbitrate grievances presumptively survives the contract's expiration, the Board reexamined and clarified its position. As a result, the Board made clear that a blanket refusal to arbitrate grievances on the ground that the contract had expired would violate Section 8(a)(5), just as such a refusal during the contract's term would violate the Act. *Indiana & Michigan Elec. Co.*, 284 N.L.R.B. at 59-60; see also NLRB Br. 4 n.4.

Here, petitioner did not refuse to arbitrate the grievances at issue for any good faith reason, such that the grievances did not arise under the contract. The record shows that petitioner categorically refused to arbitrate any post-expiration grievances, although it remained contractually obligated to arbitrate some of them. The Board found that this "generalized refusal to arbitrate * * * based on the expiration of the contract rather than the arbitrability of specific grievances" violated Seciton 8(a)(5) of the Act. Pet. App. B8. Such conduct, in the Board's considered judgment, is inconsistent with the requirements of Sections 8(a)(5) and 8(d), because the statutory duty to bargain in good faith requires the parties not only to bargain in good faith about negotiation of an agreement, but also to refrain from later unilaterally

repudiating the terms of that agreement. See, *e.g.*, *Paramount Potato Chip Co.*, 252 N.L.R.B. at 796-797; see also NLRB Br. 17-18. Accordingly, petitioner's belated attempt to shirk responsibility for its unlawful conduct must fail.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals concerning the Board's order declining to direct arbitration of the grievances should be reversed.

Respectfully submitted.

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